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No. 99-914

IN THE

# Supreme Court of the United States

KELLENBERG MEMORIAL HIGH SCHOOL
and CHAMINADE HIGH SCHOOL,

*Petitioners,*

*v.*

SECTION VIII OF THE NEW YORK STATE PUBLIC
HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT

## RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT PURSUANT TO RULE 29.6

Respondent is a not-for-profit quasi public corporation.

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## PRELIMINARY STATEMENT

Petitioners seek review of a decision of the Appellate Division, Second Department of the State of New York claiming that, as juxtaposed against a decision of a district court within the Fifth Circuit, that the decision's finding is erroneous.

There are no compelling reasons (Rule 10 of the Supreme Court) to construe an issue (blind referendum utilized by an athletic association of public high schools) pertaining to alleged due process and equal protection violations when this Court has clearly defined (and applied) the standards to be adopted in reviewing such alleged Constitutional violations. Furthermore, there is no conflict between the Fifth Circuit's Court of Appeals decision cited by Petitioners and the Appellate Division, Second Department decision under review or the New York Court of Appeals decision relied upon by the N.Y. appellate and lower court (*Archbishop Walsh High School v. Section VI of the New York State Public High School Athletic Association, Inc.*, 88 N.Y.2d 131, 643 N.Y.S.2d 928 (1996)).

This Court has clearly provided the standards to be applied in considering alleged due process and equal protection violations; the two N.Y. Courts which reviewed Petitioners' claims as well as the State's court of last resort (in the *Archbishop Walsh* decision) have correctly applied these standards and on that basis there is no reason for this Court to review the subject Appellate Division, Second Department decision. As this Court has denied writs in two matters involving similar contentions (*Denis J. O'Connell High School v. Virginia High School League*, 440 U.S. 936, 99 S. Ct. 1280 and *Walsh v Louisiana High School Athletic Association*, 449 U.S. 1124, 101 S. Ct. 939) it is respectfully submitted that the petition herein be denied.

## SUMMARY OF THE ARGUMENT

The petitioners have characterized their request for certiorari as based on a need for resolution of a conflict between a federal court of appeals decision and a decision by the highest court of New York and on the need for this Court to decide issues of significant public importance. As a preliminary matter, there is no actual conflict between the decisions invoked because the factual predicates involved called for different standards of review.

Even if a conflict were found, however, there is no need for this Court's review because cases decided since the federal case (some thirty years ago) have resolved any apparent conflict; there is no outstanding federal question in need of resolution. To the contrary, this Court's decisions make it clear that, *under the circumstances of the present case*, the New York Court of Appeals decision (*Archbishop Walsh, supra*) was properly relied upon in this case for the conclusion that the blind referendum voting procedure challenged by the petitioners violates neither the equal protection nor the due process mandates of the United States Constitution.

Because the blind referendum voting procedure does not infringe on any protected property right, liberty interest, or fundamental constitutional right, nothing more is required than a rational basis for the procedure. The need for member schools of an Athletic Association to have a voice in the competitive balance in their Association clearly provides a rational basis for the voting procedure. Because the blind referendum voting procedure involves no difference in treatment and implicates neither any suspect class nor any fundamental right, furthermore, there is simply no basis for

an equal protection challenge. Even if there were a difference in treatment, however, as with due process, nothing more is required by equal protection than a rational, nondiscriminatory basis for the distinction, a requirement that is clearly satisfied here by differences between public and private schools in recruitment potential, and issue central to matters of competitive balance, safety of athletes, and morale of competitors. Under clearly established law, therefore, there remains no important federal question for resolution by this Court.

## REASONS FOR DENYING THE WRIT

### I.

### THIS CASE DOES NOT PRESENT AN APPROPRIATE QUESTION FOR SUPREME COURT REVIEW BY CERTIORARI BECAUSE THE CLAIMED CONFLICT IS NOT BETWEEN THE DECISION OF THE HIGHEST COURT OF A STATE AND THAT OF A FEDERAL COURT OF APPEALS, BUT RATHER BETWEEN A STATE COURT DECISION AND THE DECISION OF A FEDERAL DISTRICT COURT.

The petitioners invoke *St. Augustine High School v. Louisiana High School Athletic Association*, 270 F. Supp. 767 (E.D. La. 1967), *aff'd*, 396 F.2d 224 (5th Cir. 1968), in an attempt to persuade this Court that there is a conflict between that case and the decision in their own case which requires resolution by this Court. The petitioners' position is without support for two reasons. First, the decision that they primarily rely upon is a decision by the federal district court, not the court of appeals. (*See* Petition at 4-5, 9-11.) Second, the decision by the federal court of appeals is, in

fact, not in conflict with the New York decisions claimed by the Petitioners to not have correctly applied the rationales of that Court in the petitioners' case.

The petitioners correctly characterize that district court decision in *St. Augustine*, and correctly note that the Fifth Circuit affirmed the decision. They fail to acknowledge the difference between the two decisions, however, and, therefore, incorrectly characterize the Fifth Circuit's decision. The district court, first, correctly concluded that the Louisiana High School Athletic Association (LHSAA) had denied membership to St. Augustine High School on the basis of race. *St. Augustine*, 270 F. Supp. at 775-76. The court then went on to state:

> even had the plaintiffs failed to prove that the denial of St. Augustine's application was the result of actual discrimination, the deprivation of basic rights of due process has been established here with the force of irrebuttable presumption. The very fact of the denial of St. Augustine's application by the arbitrary and capricious vote of the LHSAA membership constituted a deprivation of plaintiffs' constitutional rights.
>
> . . . .
>
> . . . *Every* school seeking membership must be faced with the prospect of securing the favorable vote of two-thirds of the members of the Association. What other state agency or association places such a burden on the citizens seeking its aid? Certainly the very thought of such an arbitrary vote by state officers or agents is

> abhorrent to the principles of the Fourteenth Amendment and every civil right of all the citizens of this country, Negro or white.
>
> . . . .
>
> . . . We simply rule that no school which meets the express and objective qualifications for membership in LHSAA may be denied admission on the basis of an arbitrary vote of the members. The state simply may not employ practices which leave such a large amount of discretion in the hands of state officials, at least in circumstances and situations where definite standards may easily be fixed without sacrificing fair and efficient administration. *Id.* at 776-77.

The district court, therefore, apparently concluded that, without reference to race, the requirement for a favorable vote of two-thirds of the current members in order for a school to become a member was unconstitutional *per se*, as a violation of equal protection and due process. The LHSAA appealed, contending, in pertinent part, there was insufficient evidence that St. Augustine was excluded on racial grounds.

The Fifth Circuit, while affirming the judgment, did not go so far as the district court had, nor did it need to, as the issue of whether the membership vote was a *per se* violation of equal protection and/or due process was not before it. To the contrary, as the Fifth Circuit's explanation makes clear, it considered and decided the case solely as a race discrimination case:

In August, 1964 St. Augustine applied for admission to LHSAA. . . . This Association has exclusive supervision of interscholastic activities between white public schools in Louisiana.

Until 1962 LHSAA had consisted of schools with all-white student bodies and faculties. The "white-only" membership clause of the Constitution was deleted in 1962. When St. Augustine applied all the public school members were schools formerly white but now integrated by court orders.

. . . The application, in accordance with past procedure of some 45 years, was scheduled to come before the 10-man executive committee of LHSAA at the annual meeting of the Association in January, 1965 for acceptance or rejection. It did not. Instead at the annual meeting the constitution was amended to require that an application must first be approved by two-thirds of the schools in the LHSAA district in which the applicant, if admitted, will compete, then by a two-thirds vote of the schools present at the annual meeting. During 1965 and pursuant to this new procedure St. Augustine secured the necessary two-third approval from the schools in its district. Its application was submitted to the general membership at the January membership at the January 1966 annual meeting and voted down 185 to 11. It is admitted that St. Augustine met all requirements for membership except the two-thirds vote of those present at the annual meeting. During 1965 other schools secured the necessary

> approval in their respective districts under the new procedure. All except St. Augustine were by vote of the Assembly admitted to membership at the January 1966 general meeting.
>
> . . . .
>
> The evidence amply supports the inference that St. Augustine was denied membership on racial grounds. No other reasonable inference is supported by the record and no other explanation is offered to us.

*St. Augustine*, 396 F.2d at 226, 228.

It was in the context of its finding of race discrimination that the Fifth Circuit stated,

> we construe the word "arbitrary" as used by the district court in the phrase "arbitrary vote" to mean a vote to deny membership to an applicant which has met proper and reasonable membership to an applicant which has met proper and reasonable membership requirements and standards as defined by the Association. If the applicant meets the standards no showing of hands can exclude it from becoming a part of this state activity.

*Id.* at 228.

New York State's highest court, in deciding the case which the petitioners view as in conflict with *St. Augustine*, clearly understood the distinction between the district court

and the Fifth Circuit's decisions and clearly understood that any reliance on *St. Augustine* would be misplaced and flawed. *Archbishop Walsh High School v. Section VI*, 643 N.Y.S.2d 928, 931 (Ct. App. 1996). As that court explained,

> No matter how ambiguous the District Court's description and analysis are in *St. Augustine* concerning the proper judicial review to be applied, the Fifth Circuit decided the case unequivocally as a preclusion from membership on racial grounds. . . . Because *St. Augustine* was thus unquestionably and ultimately rooted in a race-based equal protection challenge at the strict scrutiny level, the nisi prius precedents advanced in support of appellant's arguments in this respect fail and lack any persuasive value for the proper disposition of this case.

*Id.* at 931 (citations omitted).

Although the petitioners characterize the issue in *Archbishop Walsh* as identical to the issue in *St. Augustine* (Petition at 11), it is clear that the issues were not identical and that the differences in the factual background of the two cases mandated an entirely different analysis for each.

As is clear from the court's explanation, there is, in fact, no conflict between the Fifth Circuit's decision in *St. Augustine* and its own decision in *Archbishop Walsh*. There is, therefore, no conflict between a federal court of appeals and the highest court of a state calling for resolution by this Court. *Cf. Braxton v. United States*, 500 U.S. 344, 347 (1991) (invoking Supreme Court Rule 10.1 in explaining its grant of certiorari in that case).

More importantly, however, even if there were an apparent conflict, it would not merit consideration by this Court because, as explained, *infra*, the clearly-established precedence decided by this Court since *St. Augustine* have already resolved any such conflict, indicating both that the *St. Augustine* decision was correct in the narrow context of race discrimination and that *Archbishop Walsh* was also correct in the broader context (i.e., when there is no trigger for special scrutiny). *See Braxton*, 500 U.S. at 348-49 (even after granting certiorari, Court would not address question concerning Sentencing Guideline which had since been addressed by those responsible for the rule). Because, as explained *infra*, there was no trigger for special scrutiny in the present case, it was properly decided in reliance on the well-established principles articulated in the *Archbishop Walsh* decision.

## II.

## THIS CASE DOES NOT PRESENT AN APPROPRIATE QUESTION FOR SUPREME COURT REVIEW BY CERTIORARI BECAUSE THE QUESTION RAISED BY THE PETITIONERS DOES NOT INVOLVE ANY IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT ALREADY BEEN SETTLED BY THIS COURT.

The question presented by the petitioners is whether the "blind referendum voting procedure" violates due process and equal protection. (Petition at *i*.) It is universally recognized that associations, whether social, professional, religious, or other, have complete control over and discretion concerning conditions for admission of members, subject only to their own constitutions, charters, or by-laws, and that association membership is a privilege, not a right. 6 Am.

Jur. 2d *Associations and Clubs*, §§ 18, 19 (1999); 7 C.J.S. *Associations*, § 20 (1980). Even when an association is quasi-public, the only limitation on its right to set conditions for membership is a rational relationship between the conditions set and the association's purpose and character. 6 Am. Jur. 2d *Associations and Clubs*, § 19.

The courts will not, therefore, review an association's procedure for admitting members absent evidence that the procedure itself is a subterfuge for unlawful discrimination or is otherwise unlawful, or, in the case of professional associations, where membership is an economic necessity. 7 C.J.S. *Associations*, § 21. Long-established law from this Court makes it clear that the blind referendum voting procedure, absent something more, simply does not violate constitutional rights of either due process or equal protection.

The petitioners do not assert that Section VIII failed to follow established procedure or treated them differently, but rather that the blind referendum voting procedure is itself, inherently, constitutionally inadequate. Although the petitioners seek to invoke this Court's review of the blind referendum voting procedure, as an "abhorrent" legal doctrine which casts "an ominous shadow over the rights of all citizens," this Court has characterized just such a procedure exactly as the courts of New York state have — as a procedure which is consistent with democracy and not inconsistent with constitutional rights, unless used as a subterfuge for invidious discrimination. In upholding a similar vote requirement and distinguishing another decision in which, as in *St. Augustine*, a difference in treatment was clearly race-based , this Court explained:

In *Hunter* the citizens of Akron had amended the city charter to require that any ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval by a majority of those voting in a city election. The Court held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election. . . .

Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. . . .

. . . [R]eferendums have been a commonplace occurrence in the State's active political life. Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. . . . [A] lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this

> Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.
>
> . . . .
>
> The people of California have . . . decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."

*James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (footnotes omitted); *see also American Federation of Musicians v. Wittstein*, 379 U.S. 171, 179-81 (1964) (upholding weighted majority voting procedure of union as a "well-known system of voting embodied in many union constitutions" which well serves the purpose to guarantee members' right to participate in decisionmaking). In the present context, likewise, the referendum approval of new members ensures that member schools have a voice in a decision that could lead to substantial competitive imbalance against their athletes and could compromise the association's very purpose. That the blind referendum voting procedure challenged by the

petitioners in this case does not violate either due process or equal protection is clear from the standards that this Court has established for those claims in other contexts, as well.

Whether a rule, regulation, or procedure is evaluated under equal protection or due process, all that this Court has ever required, absent a suspect classification or infringement of a protected right, is that there be a rational basis for the challenged action. The need for determination of members concerning, not whether an applicant is qualified to be a member, whether an applicant's membership would serve the intended purposes of Section VIII and its parent association, is certainly a rational basis for the challenged blind referendum voting procedure.

### A. The Blind Referendum Voting Procedure Does Not Violate Due Process.

This Court has made it very clear that there is no "free-floating" due process right — rather, due process is required if, and only if, there exists a separate, predicate, constitutionally-protected interest. *American Manufacturers Mutual Insurance Co. v. Sullivan*, 119 S. Ct. 977, 989 (1999); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Thus, the first due process inquiry is always whether infringement of a protected right is implicated; only if it is, does the inquiry proceed to what process is due and, then, to whether the procedures provided comport with what is due. The petitioners have identified no predicate, protected interest, as those interests have been defined by this Court.

As established by this Court, due process has two components, characterized as procedural and substantive due process. *E.g.*, *Collins v. City of Harker Heights*, 503 U.S.

115, 125 (1992); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). A procedural due process claim arises only when there has been an infringement of an underlying liberty interest, as defined by those matters which are essential to the orderly pursuit of happiness, or an underlying property interest, as defined by existing rules by which individuals are entitled to certain benefits under state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-73, 577-78 (1972) (evaluating property interest in employment) (in order to have a protectable property interest, a person must have more than an abstract desire or a unilateral expectation: rather, a person must have a legitimate claim of entitlement to a particular outcome); *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) (evaluating liberty interest in parole release) (in order to establish a protected liberty interest pursuant to state-provided procedures, just as with property interests, a showing that the government has placed substantive limitations on official discretion by providing particularized standards or criteria to guide decisionmakers, thereby creating a justifiable expectation that a given result will obtain if those standards or criteria are met is required). A substantive due process claim, by contrast, arises only where there has been an infringement of an interest directly protected by the Constitution itself, as a fundamental right that is implicit in the concept of ordered liberty. *E.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring).

A procedural claim challenges the action on the basis that it was obtained without proper procedure. A substantive claim, by contrast, does not challenge the procedure but rather the action itself, as improper without reference to the fairness of the procedure used. Substantive due process is, thus, reserved for those violations of fundamental rights

which cannot be justified by any quality or quantity of procedure. *E.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). In the absence of some protected right, however, there is no right to due process, substantive or procedural.

The principles of entitlement and protected rights apply equally to the denial of an application for obtaining benefits provided by the state and to the deprivation of benefits already obtained from the state. A legitimate claim of entitlement for a benefit sought but not yet obtained exists, therefore, only where state law limits the discretion of the state actors responsible for conferring the benefit to such an extent as to confer the benefit, as of right, upon satisfaction of given prerequisites. *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970) (where statutory and administrative standards define specific standards for eligibility for welfare benefits, receipt of benefits is safeguarded by procedural due process requirements). Procedural requirements, however, whether for determining whether to grant a benefit of to withdraw it, absent a separately articulated substantive right, simply do not create constitutionally protected interests. *E.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (liberty interest cannot be defined by those procedures provided for its deprivation). Nor does the constitutional right to due process, absent a separately articulated substantive right, create any right to procedural protection.

The petitioners have not and cannot point to any protected right which might be infringed by the challenged voting procedure. They do not and cannot argue that they have any property right or liberty interest entitlement to membership in Section VIII. *See, e.g.*, *Roth*, 408 U.S. at 572-73, 577-78 (a person must have a legitimate claim of entitlement

to a particular outcome in order to have a protected property interest); *Olim*, 461 U.S. at 250-51 (government must have placed sufficient substantive limitations on official discretion to create a justifiable expectation that a given result will obtain if the standards or criteria are met in order to establish a protected liberty interest). They do not and cannot claim that the voting procedure infringes on their exercise of any fundamental right. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37-38 (1973) (even education itself is not a fundamental right or liberty). Rather, they argue that whenever the state allows more than one outcome, due process disallows any procedure which does not supply a substantive explanation for a particular outcome and that, whenever the state offers a benefit, due process requires that it must provide objective criteria by which entitlement to that benefit can be established. Stated differently, the petitioners' position is that their due process rights were violated by the NYSPHSAA's failure to require only objective standards and its failure to require reasons for a negative vote on admission.

It is the other way around: Only specific, objective criteria creating an entitlement to membership upon their satisfaction could give rise to a protected property right or liberty interest, and only such a protected right could, in turn, give rise to the constitutional requirement for procedural safeguards, such as a requirement that reasons for a negative decision be given. The fact that NYSPHSAA does not limit its membership conditions to objective standards, but allows a discretionary vote means that no entitlement has been created. NYSPHSAA's requirement for a membership vote bears an obvious relationship to the Association's purpose and to its character as an association for the benefit of public schools, in any case.

**B. The Blind Referendum Vote Does Not Violate Equal Protection.**

The equal protection clause, like the due process clause, creates no substantive rights; rather, it merely provides that a state must treat like cases alike, but may treat different cases differently. *Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997). In order to make out an equal protection claim, a petitioner must show, first, that it was treated differently from other, similarly situated persons, whether by classification or otherwise. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). There simply is no cognizable equal protection claim, regardless of rationality or irrationality, unless different treatment from similarly situated others has been adequately alleged. *Vacco*, 117 S. Ct. at 2297-98 (rules that apply evenhandedly to all unquestionably comply with equal protection requirements).

The petitioners do not and cannot assert that the challenged voting procedure even meets the threshold requirement of showing different treatment of similarly situated persons. In fact, at the time of the appellants' applications, Section VIII's constitution required approval by referendum vote for *any* new member. Since the referendum vote requirement did not distinguish between applicants even as between public and nonpublic schools, and certainly not as between private Catholic schools and other schools, there is simply no basis for an equal protection challenge.

It is elemental, however, that different treatment, even if shown, does not necessarily constitute a denial of equal protection, because a state, by definition, must be able to establish classifications that approximate the needs and

problems of its citizens while accommodating competing concerns, both public and private, and working within the practical limitations of the state, in order to fulfill its duties. Clearly, most rules, regulations, or other provisions of law differentiate between classes of people in some way and may result in disadvantage to some. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Nordlinger*, 505 U.S. at 10. Accordingly, where difference in treatment neither burdens a fundamental right nor targets a suspect class, the action of the state must be upheld if it bears a rational relation to some legitimate end. *E.g.*, *Vacco*, 117 S. Ct. at 2297; *Romer*, 517 U.S. at 631; *Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *Nordlinger*, 505 U.S. at 10. Even when a classification affects a protected class or infringes a constitutionally protected right, higher scrutiny is proper only where the challenger can show intentional discrimination. *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.4 (1996); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986).

As noted, *supra*, there is no fundamental right even to education: Clearly, there is no fundamental right to interscholastic competition or to membership in an athletic association. *See Rodriguez*, 411 U.S. at 37-38. As correctly summarized by the lower court in this matter (*see* 23a-24a of Petition):

> However as the Respondent correctly points out, procedural due process considerations do not arise unless and until a fundamental right secured under the Constitution is implicated. As noted by the Court of Appeals (and as referred to earlier in this decision) neither education itself nor participation in publicly sponsored interscholastic sports are fundamental substantive rights (*Walsh, supra*;

*Albach v Odle, 531 F2d 983, 984-985, San Antonio Independent School District v Rodriguez, 411 US 1; O'Connell High School v Virginia High School League, 581 F2d 81).*

Indeed, the very Fifth Circuit Court of Appeals whose 1968 decision is relied upon by the Petitioners determined in a 1980 decision (*Walsh v Louisiana High School Athletic Association*, 616 F.2d 152, *cert. denied*, 449 U.S. 1124, 101 S. Ct. 939 (1981)) in its review of a transfer rule promulgated by the Louisiana High School Athletic Association that the equal protection claims of the Plaintiffs were not viable

When parents whose children attended a Lutheran-affiliated school contested the transfer regulation a judicial review was necessary. The Fifth Circuit Court of Appeals stated:

> The Plaintiffs argue that the transfer rule unconstitutionally burdens their free exercise of religion guaranteed by the first amendment. These parents indicate a sincere belief that Christian education is an integral part of the mission and ministry of the Lutheran Church and that the family, rather than the state, is responsible for a child's education. Furthermore, they indicate that they responded to the dictates and compulsion of their religious beliefs by enrolling their children in Lutheran-affiliated schools. The district court determined that the operation of the transfer rule did not violate the first amendment. We agree.
>
> A regulation that is neutral on its face and is motivated by legitimate secular concerns may, in

its application, offend the first amendment requirement of governmental neutrality if it unduly burdens the free exercise of religion (citations omitted). To pass constitutional muster, the application of such a regulation either (1) must not interfere with, burden or deny the free exercise of a legitimate religious belief or (2) must be justified by a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause. (citations omitted)

It cannot be denied that, by imposing a cost on a parent's decision to enroll his children in Lutheran High School upon graduation from any of the seven Lutheran elementary schools in the metropolitan New Orleans area, the transfer rule places an indirect and incidental burden on the free exercise of the religious beliefs of these parents. The decisive issue is whether this indirect and incidental burden is an impermissible price to exact from these parents from the free exercise of their religious beliefs. We believe it is not.

. . . .

The state's interest in the regulation is compelling. Its interest in regulating interscholastic athletic competition is not disputed by the parties in this litigation. Indeed, all parties recognize that the recruiting of promising young athletes properly may be the focus of LHSAA regulations because of the unwholesome and harmful impact such recruiting has both on interscholastic athletic competition and on the individual student athletes.

The LHSAA promulgated the transfer rule to lessen or remove that harmful impact.

. . . .

The due process clause of the fourteenth amendment extends constitutional protection to those fundamental aspects of life, liberty and property that rise to the level of "legitimate claim of entitlement" but does not protect lessor interest or "mere expectations."

. . . .

Where, as here, the classification created by the regulatory scheme neither trammels fundamental rights or interests or burdens an inherently suspect class, equal protection analysis requires of the classification be rationally related to legitimate state interest (citations omitted).

The classification of students created by the transfer rule is rationally related to the state's valid and legitimate interest in determining or eliminating the recruitment of promising young athletes by overzealous coaches, fans and faculty members. The District recognized that pride of the promulgation of the transfer rule.

. . . .

The plaintiffs argue that because the evidence also suggested that recruiting had not been a problem at Lutheran High School in the past and was not

> likely to be a problem in the future the LHSAA violated the equal protection clause of the fourteenth amendment by failing to exempt it from the transfer rule. There is no merit to this argument. The equal protection clause does not require a state to grant all the Constitutionally permissible exemptions from a general statutory scheme merely because it has chosen to grant one such exception.

In the Fourth Circuit Court of Appeals decision in *Denis J. O'Connell High School*, *supra*, a Catholic high school applied for admission to the Virginia High School League, Northern Region. The application was denied (without even the benefit of a "blind referendum") on the basis that the League's constitution limited membership to "accredited state public high schools in Virginia."

The Catholic high school brought suit against the League on the basis that the League had arbitrarily classified it as a private school in violation of the equal protection clause of the Fourteenth Amendment.

In overturning the District Court the Court of Appeals stated:

> Where, as here, there is no fundamental right or suspect classification involved, the test to determine state legislation is whether the statutory classification bears some rational relationship to a legitimate state purpose. (citations omitted)
>
> . . . .

> Against this background, the League's exclusion of private schools must be viewed as one of several reasonable steps taken to combat the serious problem of adolescent students being subjected to and perhaps succumbing to pressures to attend one school over another on the basis of athletic considerations. That there was no evidence presented to establish the existence of such a problem in Virginia is not important, for not only do several provisions of the League's Constitution and Rules and Regulations show clearly the League's concern with the possible occurrence of such activities, but experience elsewhere has shown that this is indeed a problem which needs to be addressed. And "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Furthermore, neither private schools nor Catholic private schools constitute a suspect class recognized under the standards established by this Court. *See, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (suspect classes are those entitled to extraordinary protection from the majoritarian political system because they have historically been saddled with disabilities, purposely subjected to unequal treatment, or otherwise relegated to political powerlessness). No one could seriously argue that Catholic schools comprise a class saddled with disabilities and relegated to political powerlessness, and no one could reasonably suggest that they form a suspect or quasi-suspect class. *See, e.g., Menke v. Ohio High School Athletic Association*, 441 N.E.2d 620, 623 (Ohio Ct. App. 1981) (nonresident high school athletes do not comprise a "suspect class" recognized by the Supreme Court). Clearly, religious

affiliation does not comprise a suspect class, under any definition. Denial of membership in an athletic association, similarly, is not a burden upon and does not otherwise interfere with religious conduct, belief, or association.

Under the rational basis test, the State is not required to even articulate its reasons for making a particular classification; rather, the burden is on the party attacking a classification to show that it is so unrelated to any legitimate purpose as to be totally arbitrary; in other words, to negate every conceivable basis that might support it. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993). Indeed, all that is necessary for upholding a classification is that there be some set of facts that might reasonably be conceived to justify it. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

The state's apparent interest in preventing a "distinct competitive advantage" of nonpublic schools over public schools based on the larger geographic area from which nonpublic schools can draw their students and its concern that a competitive imbalance could jeopardize the safety and morale of public school athletes are certainly sufficient to support any difference in treatment between nonpublic and public schools. Although there was, in fact, no difference in treatment in this case, it bears reemphasis that it is irrelevant whether the reasons advanced by Section VIII in defense of their policy and actions, or any other rational consideration that could be offered, actually motivated their admission policy and procedure; it is constitutionally sufficient that such a reason exists.

## CONCLUSION

There is no actual conflict between the Fifth Circuit's decision in *St. Augustine* and the New York decisions in *Walsh* and this case. Rather the former was decided under a strict scrutiny review because it involved discrimination because of race, while the latter were decided under the rational basis review appropriate to matters which involve neither a suspect class nor any constitutionally protected substantive right. There is, therefore, no conflict between a federal court of appeals and the highest court of a state calling for resolution by this Court.

The law from this Court on what is required to state a due process or an equal protection claim is, furthermore, well-settled, and the decisions from the state courts of New York in this case are fully consistent with that law. There is, therefore, no important federal question in need of resolution by this Court.

The present Petition for a Writ of Certiorari should, accordingly, be denied.

Respectfully submitted,

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